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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-702

GOLDEN STATE BOTTLING COMPANY, INC., formerly d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ALL AMERICAN BEVERAGES, INC., d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Reply to Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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The Board's[1] response (hereinafter referred to as the "Board's Brief") to the Petition herein ignores points of major importance, misconstrues other significant arguments and misstates certain facts in material respects. By means of this Reply Brief, Petitioners seek to clarify the record now before this Court.

[1]In this Reply Brief, Petitioners will continue to use the terminology adopted and employed in their Petition for Writ of Certiorari.

I.

Statement of Facts.

The following comments in relation to the facts shall be limited to rectifying the following factual misstatements contained within the Board's Brief:

1. All American Had No Opportunity to Present a Defense to the Board Charges.

On page 11 of its Brief, the Board has erroneously stated that All American was not adjudged of wrongdoing without a complaint, notice, and full opportunity to present its defenses as required by the cases of *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945) and *NLRB v. Birdsall-Stockdale Motor Co.*, 208 F.2d 234 (10 Cir. 1953). The actual facts are that long prior to All American's purchase of the Pepsi-Cola Bottling Division, Golden State was found to be in violation of the National Labor Relations Act (hereinafter referred to as the "Act"). This decision had in fact been briefed and argued before the United States Court of Appeals for the Ninth Circuit many months before the purchase by All American. At no time was All American afforded any opportunity to contest the Board charges, present evidence negating the allegations, or cross-examine witnesses who testified on behalf of the Board.

Rather, All American was provided nothing more than a hearing with the limited scope of determining the amount of penalty to assess against it, the successorship issue and the knowledge issue. This is the equivalent of being adjudged of wrongdoing without complaint,

notice, or opportunity to present a defense; it is devoid of the essential elements of due process as specifically condemned in *Birdsall, supra,* and *Regal Knitwear, supra.*

2. Golden State's Distributors Were Independent Contractors.

The Board asserts that it did not find that the Golden State distributors were "independent contractors." While Petitioners concede that the Trial Examiner stated that it was unnecessary to resolve such an issue[2] (an erroneous conclusion, Petitioners submit), he nonetheless did resolve it by finding:

> "Respondent began converting its driver-salesmen to distributors, or *independent contractors,* by offering each of them . . . contracts as distributors, or *independent contractors,* under the terms of which they *realized net profits,* after the deduction of their own operating expenses, from the purchase of products from Golden State and the resale to customers . . ." [R. 119, lines 20-25; Pet. App. 17]. (Emphasis added.) See also R. 113, lines 12-20 (Pet. App. 4).

Thus, although the Trial Examiner may have deemed it unnecessary to decide this particular issue, there can be no doubt that he did in fact find that the distributors of the Petitioner Golden State were independent contractors.

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[2]See Pet. App. 20-21. References to documents contained within the appendix to the Petition for Certiorari are designated "Pet. App."

3. There Was No "Evidence" Proving Knowledge of Unfair Labor Practices on the Part of All American.

The Board has attempted to support the action of the Trial Examiner in discrediting witnesses Schilling and Crofoot by reliance on the Trial Examiner's statement that each had testified that Schilling had played no part in the settlement negotiations when, in fact, he had participated in at least one of the negotiating sessions. However, the record reveals that Crofoot himself testified (i) that Schilling attended the first negotiation meeting and (ii) that Schilling had held individual private talks with the purchaser regarding his future status [Tr. 60, 62]. Moreover, Schilling confirmed this [Tr. 131].

4. The Distributors Assigned Their Distributorship Contracts.

Finally, the Board's Brief (at p. 4 thereof) states that the distributors of Golden State assigned their distributorship contracts to All American. The actual fact is that it was Golden State which assigned the distributorship contracts it had negotiated with the individual distributors to All American [GC. Ex. 15; Tr. 74].

While this point is of little substantive significance, it clearly demonstrates the Board's misunderstanding of fundamental character of the law and practice involved in the sale and purchase of a business. It is this basic misunderstanding which, Petitioners submit, has resulted in the Board's failure to understand Petitioners' position herein and render a decision in conformity with the realities governing such sales and purchases.

II.

Argument.

1. The Successorship Doctrine Has No Application to Unfair Labor Practice Proceedings.

The argument in the Board's Brief appears to be predicted upon the assumption that Petitioners concede All American to have been not only a successor to Golden State for collective bargaining purposes, but a successor for all purposes under the Act.[8] This is totally incorrect.

While Petitioners do concede that All American would be considered a successor employer for collective bargaining purposes, they by no means concede that such status is in any way relevant to unfair labor practice proceedings under the Act. By asserting a contrary contention, the Board obfuscates the long established practice and *Board created* distinction between representation cases and unfair practice proceedings.

The authority relied upon by the Board and the court below in rendering the decision herein, *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1968), has been limited to its facts and to the collective bargaining arena by the decision of this Court in *NLRB v. Burns International Security Service,* 406 U.S. 272 (1972). Any contrary holding conflicts directly with *Regal Knitwear, supra,* which had long before established the non-applicability of the successorship doctrine to unfair labor practice proceedings. In that case, this Court specifically held that Rule 65(d) cannot be used to extend the reach of the Board's order to "successors" or "assigns" who are innocent of wrongdoing and against

[8]The Board's Brief, page 6.

whom there existed no independent basis for adjudication of liability. In *Regal Knitwear, supra,* the Court stated that only "in appropriate circumstances" an order may be "enforced against those to whom the business may have been transferred whether by means of evading the judgment or for other reasons."

The Board has attempted to avail itself of this exception by arguing that the purchase of the business by All American with knowledge of pending unfair labor practice proceedings constitutes such "appropriate circumstances." Such facts fall far short of the exception carved out in *Regal Knitwear.*

The Board's interpretation not only ignores the context in which the articulated exception was set forth, but would, if given effect, completely abrogate the *Regal Knitwear* rule. The exception was formulated after this Court recognized that a successor may merely be a *disguised continuance* of an old employer, an instrumentality through which an employer or a defendant seeks to *evade* an order or a person in active concert or *participation* with the defendant. The Court specifically stated on page 15:

> "In both of these cases, *the reference is not merely to succession,* but to a relationship between the defendant and the successor which might *of itself* establish liability within the terms of Rule 65." (Emphasis supplied).

Such facts do not exist in this matter. Here, even the Board concedes that the transaction was completely bona fide and the transfer of interest genuine. Thus, to uphold the order of the Board and the decision of the court below, this Court must overrule *Regal Knitwear, supra.*

The articulated "authority" for the Board's apparent decision to ignore *Regal Knitwear, supra,* lies exclusively in its "Perma Vinyl" doctrine.[4] The decision rendered below is the first time that such doctrine has been approved without qualification by any court. The court in *U.S. Pipe & Foundry Co. v. NLRB,* 398 F.2d 544 (5th Cir. 1968), upheld the *Perma Vinyl* doctrine *only* in relation to the Board's order that a successor was liable for the reinstatement of a wrongfully discharged employee. That case *expressly refused* to sanction or adopt the Board's language which had declared the predecessor liable for back pay beyond the date of the sale of the business and its successor similarly liable for the period prior or subsequent to the date of the purchase.

Any reliance upon the *Perma Vinyl* doctrine constitutes nothing more than a bootstrap argument in view of the fact that that case was and remains, without explanation, not only in direct conflict with the decisions of this Court in *Regal Knitwear, supra,* and *Textile Workers v. Darlington Mfg. Co.,* 380 U.S. 263 (1965) but also the following Circuit Court of Appeals' decisions directly on point and flatly preclusive of such a doctrine: *NLRB v. New Madrid Mfg. Co.,* 215 F.2d 908 (8th Cir. 1954); *NLRB v. Herman Bros. Pet Supply,* 325 F.2d 68 (6th Cir. 1963); *Makela Welding, Inc. v. NLRB,* 387 F.2d 40 (6th Cir. 1967); *NLRB v. Lunder Shoe Corp.,* 211 F.2d 284 (1st Cir. 1954); and *NLRB v. Birdsall-Stockdale Motor Co., supra.* Furthermore, in establishing this "doctrine," the Board ignored the exhaustive analysis and elaborate rationale supporting its own prior determination in *Symms Grocer Co.,* 109 NLRB No. 58, where it held that no authority

[4] *Perma Vinyl Corp.,* 164 NLRB 968.

existed under the Act for imposing such liability on a successor *with or without* knowledge.

2. By Its Silence, the Board Concedes That the Predecessor Has No Liability Beyond the Date of Sale of the Business.

It must be noted that the Board's Brief completely ignores the consequences of its order on the predecessor, Golden State. The Board does not dispute that its order is in direct conflict with the decision of this Court set forth in *Darlington, supra*. Furthermore, the Board's Brief makes no attempt to resolve the dilemma imposed upon Golden State by an order which continues the accrual of damages while providing absolutely no opportunity for their termination. The Board has simply ignored the fact that it has left a party faced with the obligation of paying back wages, *ad infinitum*, without any plausible means of terminating such continuing liability.

3. There Was No Evidence Whatever to Support the Board's Finding That the Successor Had Prior Knowledge of the Predecessor's Unfair Labor Practices.

The Board has held that All American had knowledge of the unfair labor practices of Golden State prior to its purchase of the Pepsi-Cola Bottling Division based upon a "disbelief" of witnesses who had been called by the General Counsel and who testified that knowledge did not exist. The Board drew an inference of knowledge from the failure of Petitioners to call witnesses who would have done nothing more than corroborate the testimony of the General Counsel's own witnesses.

The General Counsel had the burden of proof on the issue of whether knowledge existed. The *only* witnesses he called positively denied that such knowledge existed. Thus, no evidence was ever presented upon which a finding of knowledge could be based. Petitioners were

hardly under obligation to call further witnesses on the point. Therefore, no inference of knowledge could be legitimately drawn by the Board nor can its finding on the issue stand.

4. The Act Requires Payment of "Back Pay," Not "Speculative Profits" From an Independent Business.

The Board's Brief would have the Court ignore the fact that the order extends far beyond the scope of the Act by requiring the Petitioners to establish a wrongfully discharged employee in an independent business and pay him speculative damages in the form of "anticipated profits" from a business in which he had absolutely no prior experience and for which there was no prior earnings history.

III.

Conclusion.

The Board's Brief fails to reconcile the conflict between the opinion of the court below and the decisions of this Court and many Circuit Courts of Appeals. Furthermore, it ignores the several issues of first impression.

The potential for conflict and confusion which has been created by this drastic departure from the settled rules of prior decisions cannot be left unresolved. Therefore, Petitioners urge that their Petition be granted.

Respectfully submitted,

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